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No. 94-566

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRIAN M. FREEMAN,

Petitioner,

vs.

MOIRA JOHNSTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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This Court Should Grant the Petition to Clarify the "Purposeful Avoidance of the Truth" Doctrine

Respondent's arguments do not even acknowledge that "purposeful avoidance of the truth" is a distinct test for establishing the serious doubt necessary for the reckless disregard branch of actual malice. This misreading of this Court's decision in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) and the Ninth Circuit's decision in *Masson v. New Yorker Magazine*, 960 F.2d 89 (9th

Cir. 1992), does nothing but highlight the confusion evident in the New York Court of Appeals' decision. By requiring "serious doubt" as the level of "doubt" inherent in the "obvious reason to doubt" necessary for the "purposeful avoidance of the truth" doctrine the New York Court's decision has rendered that doctrine meaningless.

Clarification of the "purposeful avoidance of the truth" doctrine is not an academic exercise as respondent infers. It is an absolute necessity to maintain the delicate balance between First Amendment interests and the protection of reputation which the Court has so carefully designed. Resolution of this issue will define in a predictable manner for the bench, the bar and the media the responsibility of the media and the concerns of the First Amendment when the media have information which support different conclusions and fail to check with known accessible sources who have personal knowledge of the truth.

Petitioner agrees that ultimately "serious doubt" must be shown to have been entertained by respondent to constitute "reckless disregard." However, the Ninth Circuit in *Masson* specifically states in interpreting the purposeful avoidance doctrine set forth in *Harte-Hanks* that one of the ways to establish reckless disregard is to show that (1) the circumstances surrounding publication gave the publisher "obvious reason to doubt the veracity of the [author] or the accuracy of the [facts and quotations in her book or article]," *and* that (2) "the publisher failed to take reasonable steps to dispel those doubts." *Masson*, 960 F.2d at 900. The *Masson* court describes the above two-part test[1] as a "different path(s) to the same

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[1] Respondent makes the preposterous argument that *Masson* does not set forth a two part "purposeful avoidance of the truth" analysis. Yet, the *Masson* court, specifically states: "The New Yorker had developed 'obvious reasons to doubt' the accuracy of the quotations but, in an effort to 'purposeful[ly]

(Footnote continued)

conclusion [of recklessness]," as establishing a high degree of awareness of falsity. *Id.*

The above two-part test which allows a jury to infer that serious doubt was entertained and that, therefore, reckless disregard existed, requires a level of "doubt" in the "obvious reason to doubt" test that does not by itself constitute reckless disregard.[2] Requiring an initial level of "serious doubt" in the "obvious reason to doubt" test would end any need for further analysis of a journalist's actions to dispel doubt, since serious doubt by itself is sufficient to prove reckless disregard. Neither this Court in *Harte-Hanks*, nor the Ninth Circuit in *Masson* explaining the *Harte-Hanks* purposeful avoidance doctrine, intended to set forth a meaningless doctrine and test.

Respondent's arguments that petitioner seeks to establish a new constitutional test or a new standard or a negligence standard for public figures or is seeking to expand the purposeful avoidance doctrine into the sole definition of reckless disregard or is merely attempting to "second guess" the New York Court of Appeals on the factual record are preposterous. Petitioner solely seeks to have this Court clarify the level of doubt involved in the "obvious reason to doubt" *test*, which as interpreted by the New York Court of Appeals is

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avoid[] ... the truth,' failed to conduct a reasonable investigation of Masson's claims of inaccuracy." *Masson*, 960 F.2d at 901. *See also*, *Masson* at footnote 5, specifically referring to the two part test as the "standard prescribed by the Supreme Court in *Harte-Hanks*." *Id.*

[2] Petitioner does not contend as respondent claims that any possible difference in information between two sources obligates a journalist to seek other verification. Rather, the "doubt" that triggers a journalist's obligation to act reasonably and dispel doubt must be less than the level of "serious doubt" ultimately necessary to have been entertained by a journalist to establish "reckless disregard."

directly contradictory to this Court's holding in *Harte-Hanks* and the Ninth Circuit analysis in *Masson*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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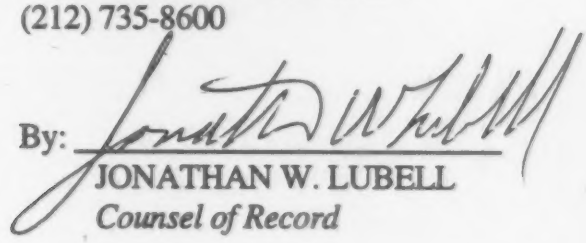
By: 
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